No. 76-31

In the Supreme Court of the United States

OCTOBER TERM, 1976

CALLIE BLAINE EISNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 533 F. 2d 987. The memorandum opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on April 14, 1976, and a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. D) was denied on June 15, 1976. The petition for a writ of certiorari was filed on July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether petitioner's illegal activities occurred subsequent to her use of a facility of interstate commerce.

3. Whether the exclusion of spectators, but not the press, from the courtroom during the testimony of a witness who feared for her safety violated petitioner's Sixth Amendment right to a public trial.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of using a facility of interstate commerce to promote an illegal activity (prostitution), in violation of 18 U.S.C. 1952.[1] She was fined $5,000 and sentenced to eighteen months' imprisonment. The court of appeals affirmed (Pet. App. B).

The evidence showed that petitioner owned "The Pink Pussycat", a nightclub located in Newport, Kentucky, which employed prostitutes to engage in sexual acts with its customers for compensation (Pet. Apps. A, p. 3a; B, p. 6a). Under the club's operating procedure, after the women danced on stage they circulated among the customers to solicit the purchase of drinks. Customers who purchased liquor at a sufficiently high price would be escorted to a specifically designated back room of the club to engage in sexual intercourse or other illicit sexual activities (Tr. 49-52, 80; Pet. App. A, p. 3a). The prostitutes were paid a minimum base salary and compensated for the liquor and sex sales they generated on a commission basis (Tr. 79-80, 150). These acts of prostitution were performed with petitioner's knowledge and consent (Pet. Apps. A, p. 3a; B, pp. 7a-8a).

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[1]Co-defendant Bernice Jones, the manager of petitioner's nightclub, also was convicted of this offense.

Jack Trainer was a frequent customer of the club. Between August 1973 and February 1974, the club accepted fifteen of his checks drawn on an Ohio bank as payment for his sexual entertainment (Pet. Apps. A, pp. 2a-3a; B, pp. 6a-7a). These checks were endorsed by either petitioner or co-defendant Jones and deposited in the club's account in a Kentucky bank. The checks were eventually presented to Trainer's Ohio bank for payment, and the proceeds were remitted to the Kentucky bank. This pattern of the movement of Trainer's checks and the return payments in interstate commerce provided the jurisdictional basis for this Travel Act prosecution.

ARGUMENT

1. Petitioner contends (Pet. 18-19) that the evidence failed to show that acts of prostitution were conducted in her club with her knowledge and consent and thus was insufficient to support her conviction. However, viewing the record in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, there was ample evidence to support her conviction. The evidence showed that while petitioner was present in the club, her employees continued to escort customers into the back room for sexual interludes without her objection (Tr. 91-93; Pet. App. B, p. 6a). Petitioner also was active in the management of the club. She kept its daily ledgers, which showed the income each dancer generated (Tr. 162-165, 174-175), and she often paid the girls herself (Pet. App. B, p. 6a). Because their base pay was so negligible, petitioner thus was aware of the sexually based commission formula utilized by the club (Tr. 187). Furthermore, petitioner endorsed two of Trainer's checks for desposit (Pet. App. A, p.

2a).[2] Thus, there was sufficient evidence to support the conclusions of the courts below that the prostitution activities took place with petitioner's knowledge and consent, and this factual issue does not warrant further review.

2. Petitioner also contends (Pet. 11-14) that the evidence was insufficient to support her conviction because it failed to show that she utilized a facility in interstate commerce and "thereafter" committed an unlawful act, as required by Section 1952. Rather, she contends that since, in each instance, the utilization of interstate check clearing facilities followed the prohibited act of prostitution, she is not subject to prosecution under the Travel Act. However, as the court of appeals noted (Pet. App. B, pp. 14a-15a), over a period of five months the club cleared a series of 15 checks from Trainer constituting payment for sexual entertainment. Thus, the interstate travel of fourteen of the checks was followed by additional acts of prostitution in violation of Kentucky law (Pet. App. B, p. 15a). There was accordingly sufficient evidence that the petitioner performed illegal acts "subsequent" to the use of a facility in interstate commerce, as required by Section 1952 (*ibid.*). See *United States* v. *LeFaivre*, 507 F. 2d 1288, 1291 (C.A. 4), certiorari denied, 420 U.S. 1004; cf. *United States* v. *Zemater*, 501 F. 2d 540 (C.A. 7).[3]

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[2]Co-defendant Jones's testimony that petitioner "knew nothing" of the club's illicit operations (Pet. 18) was part of Jones's overall, self-serving denial that she herself was unaware of the illegal sexual acts performed at the club (Tr. 162, 172).

[3]Petitioner erroneously suggests (Pet. 11-14) the existence of a conflict between a series of Seventh Circuit cases and *United States* v. *LeFaivre*, *supra*, and other Fourth Circuit cases on this issue. As the court of appeals properly noted (Pet. App. B, p. 12a, n. 5), however, the question upon which those circuits are in disagreement is whether a use of interstate banking channels that is minimal and incidental to the purpose of the illegal scheme is a sufficient basis for federal prosecution under the Travel Act. Petitioner's use of those facilities was not minimal as in *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7) (one check), but consisted of the deposit of fifteen checks in interstate banking channels. Moreover, the acceptance and interstate travel of these checks was not incidental to the conduct of her criminal activity but was necessary to retain the patronage of Trainer, one of her club's best customers (Tr. 152). In these circumstances, even under the Seventh Circuit's view of the requisite sufficiency of the federal jurisdictional peg, petitioner was subject to prosecution under the Travel Act. See *United States* v. *Isaacs*, 493 F. 2d 1124, 1149 (C.A. 7), certiorari denied, 417 U.S. 976.

3. Petitioner also contends (Pet. 15-17) that the district court denied her the right to a public trial by excluding all members of the general public except the press from the courtroom during the testimony of government witness Tippitt. The trial court ordered the temporary exclusion of spectators because it found that " '[t]here is reason to believe that this next witness has a fear of the courtroom and the persons that might be in it, and this Court is unable to say that that fear is unreal or imaginative * * *' " (Pet. App. B, pp. 15a-16a).

The underlying purpose of the Sixth Amendment right to a public trial is to provide "a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (footnote omitted); see *Estes* v. *Texas*, 381 U.S. 532, 539; cf. *Nebraska Press Assn.* v. *Stuart*, No. 75-817, decided June 30, 1976, slip op. 19. However, it is well established that the partial exclusion of the public from the courtroom out of a reasonably founded concern for a witness's safety is constitutionally permissible. *United States*

ex rel. Orlando v. *Fay*, 350 F. 2d 967 (C.A. 2), certiorari denied *sub nom Orlando* v. *Follette*, 384 U.S. 1008; see *United States ex rel. Lloyd* v. *Vincent*, 520 F. 2d 1272, 1274 (C.A. 2), certiorari denied *sub nom. Anthony* v. *Vincent*, 423 U.S. 934.

In the instant case, petitioner's right to a public trial was fully protected throughout the proceedings by the presence of the press in the courtroom. The limited exclusion of other members of the public during the testimony of one witness did not threaten to transform the proceedings into a secret trial and thus did not implicate petitioner's Sixth Amendment right.[4]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1976.

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[4]To the extent that petitioner suggests that the district court abused its discretion in excluding spectators on an insufficient record to substantiate the reasonableness of the witness's fear (Pet. 16), this factual issue does not warrant review here. Petitioner made no request for a hearing on this issue at trial. Moreover, the court of appeals has instructed the courts subject to its jurisdiction that the better practice in the future would be to convene such a hearing prior to deciding whether sufficient justification exists (Pet. App. B, p. 18a).

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